

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1

INQUIRY CONCERNING
A JUDGE, NO. 03-14

RE: JAMES E. HENSON

MOTION TO STRIKE SPECIAL COUNSEL-S NOTICE OF FILING

The Honorable James E. Henson, by and through his undersigned attorney, hereby moves this Court for an Order striking Special Counsel-s Notice of Filing, and as grounds therefore asserts the following:

1. On May 3, 2005, almost seven months after the trial in this case, and long after the Hearing Panel issued its Findings, Conclusions and Recommendations, the JQC has filed a notice seeking to introduce an errata sheet prepared by Dr. Alberto Jimenez into the record.

2. As previously asserted in Judge Henson-s Reply, the JQC has failed to provide this Court with a record citation showing that this errata sheet was introduced into evidence or shown to the Hearing Panel. In its Notice of Filing, the JQC once again fails to provide a record citation establishing that the errata sheet was introduced into evidence at trial.

3. The fact that Special Counsel filed Dr. Jimenez- deposition transcript with John Beranek, counsel for the Hearing Panel, almost three weeks before the trial on October 12, 2004, fails to establish that the errata sheet in question was introduced into evidence at the trial or considered by the Hearing Panel in

reaching its decision.

4. In a JQC proceeding, this Court acts in a review capacity and must independently review the record and assess the factual findings, conclusions, and recommendations of the Hearing Panel. *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997).

5. Therefore, it is axiomatic that this Court, in its review capacity, cannot consider evidence which has never been introduced into the record.

6. Moreover, pursuant to Rule 21, Florida Judicial Qualifications Commission Rules, the Florida Rules of Appellate Procedure apply to this Court's review of the Hearing Panel's Findings, Conclusions and Recommendations.

7. The JQC Special Counsel's attempt to supplement the record at this late date is analogous to a litigant attempting to add additional evidence which was not introduced at trial to the record on appeal in the appellate court.

8. Although Fla. R. App. P. 9.200(f) allows supplementation of the record submitted to an appellate court with an item which was considered by the lower tribunal, it does not permit appellate parties to supplement the record with new evidence or to correct inadequacies in the record which result from the failure of a party to make a record before the lower tribunal. *Poteat v. Guardianship of Poteat*, 771 So. 2d 569, 573 (Fla. 4th DCA 2000) (striking motion to supplement the record); *Thornber v. City of Fort Walton Beach*,

534 So. 2d 754 (Fla. 1st DCA 1988) (same).

9. That an appellate court may not consider matters outside the record is so elemental that there is no excuse for an attorney to attempt to bring such matters before the court.® *Thornber*, 534 So. 2d at 755.

10. The errata sheet is neither mentioned in the transcript of the trial, nor was it offered or admitted into evidence at trial.

11. Since there is no evidence that the errata sheet in question was actually introduced into evidence or considered by the Hearing Panel, there is no legal basis for the JQC to supplement the record with the errata sheet.

12. The JQC's attempt to improperly supplement the record lends additional support to Judge Henson's contention that the JQC failed to present clear and convincing evidence of his guilt on Count Two (advising Diana Jimenez to flee the jurisdiction).

WHEREFORE, the Honorable James E. Henson respectfully requests that this Honorable Court enter an Order striking Special Counsel's Notice of Filing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this ____ day of May, 2005 to MARK HULSEY, ESQ. and E. LANNY RUSSELL, ESQ., Special Counsel for the Florida Judicial Qualifications Commission, Smith Hulsey & Busey,

225 Water Street, Suite 1800, Jacksonville, Florida 32202; THOMAS C. MACDONALD, JR., General Counsel, Judicial Qualifications Commission, 1904 Holly Lane, Tampa, FL 33629 and BROOKE KENNERLY, Executive Director, Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, FL 32303.

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